No. 77-1529

In the Supreme Court of the United States

OCTOBER TERM, 1977

NEW YORK STATE COMMISSION ON CABLE TELEVISION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-14a) is reported at 571 F. 2d 95. The opinion of the Federal Communications Commission is reported at 59 F.C.C. 2d 1344. The Commission's opinion on rehearing (Pet. App. 17a-28a) is reported at 62 F.C.C. 975.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1978. The petition for a writ of certiorari was filed on April 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly interpreted its regulation governing franchise fee restrictions on cable television systems to prohibit increases in franchise fees for those systems falling within the "grandfather" clause of the regulation.

STATEMENT

1. In 1972 the Federal Communications Commission adopted a comprehensive set of regulations governing all aspects of cable television service, including broadcast signal carriage, public access, technical standards, and local franchise standards. One of the regulations, which is codified at 47 C.F.R. 76.31(b) (reprinted at Pet. 2-3) prohibited franchise fees from exceeding five percent of a cable system's gross subscriber revenues. The five percent ceiling was imposed in response to concerns that some municipalities were exacting exorbitant fees from cable systems, far in excess of the costs of regulating the systems. The regulation reflected the Commission's belief that excessive fees might burden the cable systems to such an extent that they could not fulfill their anticipated role in the development of new communications services (Pet. App. 4a-5a). *Cable Television Report and Order*, 36 F.C.C. 2d 143, 209.

Although the Commission concluded that the fee limitation was in the public interest, it recognized that many cable systems were already operating under franchises providing for fees somewhat in excess of five percent and that requiring immediate renegotiation of those franchises could be highly disruptive. *Reconsideration of the Cable Television Report and Order*, 36 F.C.C. 2d 326, 366. Accordingly, the Commission added a "grandfather" provision to the rules, permitting the

collection of larger franchise fees until March 31, 1977, or until the expiration of the current franchise, for systems in operation as of March 31, 1972. *Ibid.*[1]

2. Shortly after the "grandfather" provision was adopted, the State of New York established a program of statewide regulation of cable television systems and created petitioner New York State Commission on Cable Television to administer the program. Petitioner was authorized to collect up to one percent (later increased to two percent) of the gross annual receipts of all cable television systems in the state to cover the cost of the regulatory program. This fee was imposed in addition to existing municipal franchise fees (Pet. App. 5a).

Several cable television operators refused to pay some or all of the assessed fee, arguing that the state fee could not be added to those grandfathered municipal fees that were already in excess of the five percent permitted by the Commission's regulations. Petitioner then sought a declaratory ruling from the Commission that collection of the two percent state fee would be consistent with Section 76.31(b). Petitioner argued that as to those cable systems in operation as of the grandfather date, March 31, 1972, the franchise fee limitation is wholly inapplicable (Pet. App. 5a-6a).

The Commission denied the request for declaratory relief, holding that the state franchise fee may not be added to an existing municipal fee if the total fee would then exceed five percent. The Commission ruled that the grandfather clause in Section 76.31(b) permitted the

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[1]The termination date was subsequently extended. Grandfathered franchise fees may now continue in force until the expiration of the franchise, or for 15 years from the date it was granted, whichever occurs first. *Report and Order*, 66 F.C.C. 2d 380, 403.

continued collection of previously applicable fees, but that it would contravene the policy underlying the regulation to allow unlimited increases in fees on systems covered by the grandfather clause (Pet. App. 23a).

3. The court of appeals recognized that Section 76.31(b), if read literally as urged by petitioner, would "not make much sense" since it would effectively remove altogether the rule's restraints on franchises in operation as of the "grandfather" date. (Pet. App. 7a). The court rejected this literal interpretation and looked instead to the "common sense" of the regulation, "to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed" (Pet. App. 7a). With this analysis the court concluded (Pet. App. 8a) that

> [w]hat we are probably confronted with here is an inadvertent gap in the intent of the regulators: having never considered the possibility that either state or local authorities would increase fees on grandfathered systems where combined fees already exceeded the Regulation's limits prior to its adoption, the FCC did not explicitly preclude such increases in the Regulation.

Concluding that the rule was clearly intended to preserve existing fees, but not to expose existing systems to unlimited fee increases, the court sustained the Commission's interpretation of its regulation (Pet. App. 8a-11a).

ARGUMENT

1. Petitioner's principal contention is that Section 76.31(b) "refers to systems, not fees" and that on a literal reading, the grandfather clause wholly exempts systems in effect as of March 31, 1972 from the regulation, rather than freezing franchise fees for those systems (Pet. 12).

No doubt, the more natural reading of the regulation supports petitioner's view. A literal interpretation of the grandfather clause in this respect, however, is contrary to the policy underlying the rule. The fee limitations were imposed in order to protect cable systems from the imposition of financial burdens that could thwart their development and thus frustrate federal communications policy. *Cable Television Report and Order, supra,* 36 F.C.C. 2d 209. Franchise fees in excess of five percent were permitted under the grandfather clause simply to preserve contracts executed in good faith and to avoid the disruptions that would attend compulsory renegotiation of those contracts. The grandfather clause was intended to maintain the *status quo* on franchise fees, not to subject grandfathered systems to precisely the kinds of unrestrained fee increases that the regulation was designed to prohibit. Accordingly, the Commission's interpretation of the rule to bar petitioner's imposition of new and excessive fees on cable systems is entirely consistent with the purposes underlying the rule and its grandfather clause. For that reason, the court of appeals properly respected the agency's interpretation of its own regulation. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-414; see also *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 394 U.S. 367, 381.

As the court of appeals noted (Pet. App. 9a), petitioner's claim that the Commission's decision will cripple the state regulatory effort is unpersuasive. Under a recently adopted rule, the Commission permits franchise fees to be based on total system revenues rather than subscriber revenues, as was the case in the original rule. *Report and Order*, 66 F.C.C. 2d 380, 404 n. 27. This expanded fee base provides increased revenues on which state and municipal regulatory systems may draw to support their regulatory efforts. Moreover, if this increase

does not generate sufficient revenues, petitioner and other similarly situated regulatory bodies may seek a waiver of the fee limitation, which can be granted where a fee in excess of a total of five percent is needed for regulatory purposes, as petitioner claims to be the case here (Pet. App. 9a). See 47 C.F.R. 76.7.[2]

2. As petitioner acknowledges (Pet. 10), its contention that the Commission does not have statutory authority to limit franchise fees (Pet. 10-12) is raised for the first time in this Court. Having failed to raise the issue below, petitioner may not pursue it here. *Duignan* v. *United States*, 274 U.S. 195, 200; *Tyrrell* v. *District of Columbia*, 243 U.S. 1.

In any event, the challenged rule is within the Commission's jurisdiction over cable television. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649, the Court upheld the Commission's authority to promulgate cable television rules designed to "further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *." *Id.* at 667-668. The rule at issue in this case fits this test precisely. As the Commission explained, the rule was responsive to evidence that the exorbitant fees exacted by some municipalities threatened the health and development of cable television services. *Cable Television Report and Order, supra*, 36 F.C.C. 2d at 209. Preventing the loss or deterioration of a communications service within a community is a well-recognized basis for the Commission's exercise of its regulatory authority. See *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440 (C.A.D.C.).

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[2]On June 2, 1978, petitioner in fact filed a petition with the Commission for waiver of the fee limitation. FCC Docket No. CSR-1287.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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